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No. 09-1110

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALEX B. PARK,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE RESPONDENT FAILS TO ADDRESS THE ISSUES PRESENTED BY PETITIONER'S WRIT OF CERTIORARI

The respondent could not be more wrong when it argues that "while Park disagrees with the Wisconsin Court of Appeals' conclusion, he cannot seriously challenge the principles it sought to apply." Mr. Park has filed this writ precisely because he takes serious issue with the primary principle employed by the Court of Appeals to uphold the warrant in this case – namely that a probable cause finding can be made based upon a search warrant affidavit that contains virtually no incriminating individualized facts by applying the inference made available by the *Martin, Gourde* and *Froman* line of cases. Those cases would appear to allow a court reviewing a search warrant application to find, based solely on the fact that an individual accessed a website that contained both legal pornography and illegal child pornography, that he viewed and hoarded illegal images for years without any individualized evidence the person viewed illegal images or had an interest in the child pornography contained in the website. The petitioner asserts that application of that inference here, where Agent Szatkowski's boilerplate affidavit fails to allege particularized evidence regarding either the website or Mr. Park and his conduct, violates the Fourth Amendment.

The respondent attempts to divert attention away from the insufficiency of Agent Szatkowski's

boilerplate affidavit in this case by spending pages of its brief discussing "TIFS" and "computer caches" and the "evidence of" and "present possession" approaches to analyzing saved images. None of this information was included in the warrant affidavit and therefore available to the magistrate reviewing the warrant application, nor was it ever part of the trial court record in this case. The fact the petitioner has to go outside the record to find some basis to find probable cause in this warrant application is a statement as to just how lacking the affidavit is as to the kind of individualized facts that are commonplace in cases dealing with search warrants for child pornography and how critical the application of the inference authorized by the *Martin, Gourde* and *Froman* line of cases is to the result in this case.

The respondent repeatedly mischaracterizes the petitioner's argument. The respondent argues that the "major flaw" in the petitioner's position is that he equates the term "download" with the process of "actively saving digital data." The respondent asserts that the "premise of Park's argument" is that he must "actively save an illegal image" to violate Wisconsin law and that the search warrant affidavit was deficient because it did not provide "individualized evidence that he saved illegal images." (Resp. Brief 4-5, 9). The petitioner has never asserted that purposefully viewing a digital image of child pornography is not a violation of Wisconsin law and cited the relevant law in his original brief. *See State v. Lindgren*, 275 Wis. 2d 851, 687 N.W.2d 60 (Ct. App. 2004). While the information regarding "TIFS" and "computer

caches" the respondent discusses at length in its brief may allow for the possibility that a computer might have without an individual's knowledge or intent automatically saved an image that one never intended to view when he innocently happened upon a website that contained some illegal images, that potential event does not establish probable cause to believe that an individual intentionally viewed illegal images, has an appetite for child pornography and amassed a collection of illegal images over the next 25 months. Again, the fact the respondent has to resort to this type of argument is another indication of just how few individualized facts are alleged in the warrant affidavit and demonstrates how critical application of the inference at issue is to a finding of probable cause.

II. THE SEARCH WARRANT AFFIDAVIT FAILED TO ALLEGE SUFFICIENT INDIVIDUALIZED FACTS TO SUPPORT THE USE OF THE INFERENCE RECOGNIZED BY THE *MARTIN, GOURDE* AND *FROMAN* CASES TO ESTABLISH PROBABLE CAUSE

Mr. Park argues that a single two-year-old purchase of an unknown type of access for an undetermined period of time to a website that contains both legal and illegal pornography, without knowing more about the website and the individual involved, does not establish the particularized suspicion required by the United States and Wisconsin Constitutions to support the issuance of a search

warrant for a person's residence. Agent Szatkowski's affidavit fails to establish with particularized evidence a fair probability that Mr. Park purposefully visited the *darkfeelings* website knowing that it contained child pornography and with the intent to view illegal images. Similarly, there are no particularized facts contained in the warrant application about Mr. Park that could lead a reviewing magistrate to reasonably conclude that illegal images would be found on his home computer or in his residence two years after his alleged purchase of a membership to the website.

The respondent argues that the petitioner's position relies on a "library analysis by scholars," not on an analysis as understood by those "versed in the field of law enforcement." This quote comes from this court's decision in *Illinois v. Gates*, 462 U.S. 213, 232 (1983), where this court stated: "Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* It is, quite frankly, disingenuous for the respondent to suggest it is Mr. Park who wants to conduct a "library analysis" here. It is the petitioner who cites the court to numerous relevant cases dealing with the same kind of search warrants seeking the same kind of evidence to support his legal argument. It is the respondent who fails to cite to any relevant precedent to suggest a warrant application with as few particularized facts as are present here should be upheld. It is the respondent who engages in a "library analysis" when it argues technical matters regarding

computer operations it obtained from two law review articles, an online technical dictionary and Wikipedia. (Resp. Brief 5).

Ironically, it is the respondent's argument that rests on this Court ultimately ignoring the fact that Agent Szatkowski is an agent experienced in the investigation of child pornography cases, that he is an "expert" in the field. (Pet. App. 77-80). An expert would know how child pornography websites advertise to potential visitors, how different types of memberships afford different types of access, that some websites are dedicated solely to those with an appetite for child pornography, that website names can indicate to prospective viewers the illegal content of the website, etc. The fact that the affidavit in this case does not state with particularity this type of evidence can only mean that Agent Szatkowski either did not conduct a sufficient investigation to obtain that information in his haste to obtain the warrant, or if he did have information regarding those matters, that what he knew was not incriminating so it was omitted. It is the petitioner, not the respondent, who wants this court to analyze the affidavit as those "versed in the field of law enforcement" would.

For example, the State relies heavily on the fact that the affidavit alleges the website contained an "extensive collection" of child pornography. An experienced agent "versed in the field of law enforcement," one who was an expert in investigation of child pornography cases, would know that some websites are dedicated solely to the dissemination of images of

child pornography and have virtually no content of interest to those searching for legal pornography. Such an experienced agent would know to state that a website was dedicated to illegal content in a search warrant application. The warrant applications in cases such as *United States v. Kunen,* 323 F.Supp.2d 390 (E.D. New York 2004) and *United States v. Martin,* 426 F.3d 68 (2d Cir. 2005), as discussed in the petitioner's original brief, contained that information. Agent Szatkowski, being an expert, can be presumed to have known exactly what he was doing when he stated in the warrant application that the website contained an "extensive collection" of child pornography. To one "versed in law enforcement," that means it contained a number of illegal images in addition to legal images. As such, the respondent in its brief does not take issue with Mr. Park's assertion that only a portion of the *darkfeelings* website contained illegal images. As damning as the description "extensive collection" may seem, in the end the warrant application here fails to give the magistrate enough information to either conclude that only those interested in child pornography would go to the *darkfeelings* website or to presume anything about what one would see who happened upon the website.

Agents experienced in the investigation of these cases know that some websites are structured and set up in a way that would require that someone deciding whether to enter the website would be informed by the welcome page or advertising of the illegal content within. Experienced agents include such information regarding warnings and advertising in their search

warrant applications when it exists. The warrant applications in *United States v. Laufer*, 245 F.Supp.2d 503 (W.D. New York 2003), *United States v. Froman*, 355 F.3d 882, 890 (5th Cir. 2004), and *United States v. Gourde,* 382 F.3d 1003 (9th Cir. 2004), *rehearing en banc,* 440 F.3d 1065 (9th Cir. 2006), as discussed in petitioner's original brief, serve as examples here. As the Court of Appeals decision in *Park I* noted, Agent Szatkowski's affidavit does not state that an individual visiting the *darkfeelings* website would see advertising or otherwise be warned that it contained illegal child pornography before purchasing a membership and/or accessing any illegal images. (Pet. App. 50). There are no facts in the affidavit that establish Mr. Park would have known that the contents of the website included illegal child pornography before he purchased a membership with his credit card.

Agents experienced in the investigation of child pornography cases include in their warrant applications specific information regarding what kind of access is granted by the different types of memberships commonly available to pornography websites, the length of the target's memberships, etc. Again, as discussed in petitioner's original brief, this kind of information was included in the warrant applications at issue in *United States v. Strauser*, 247 F.Supp.2d 1135 (E.D. Missouri 2003), *United States v. Laufer*, 245 F.Supp.2d 503 (W.D. New York 2003), and *United States v. Wagers*, 452 F.3d 534 (6th Cir. 2006). While the respondent accuses Mr. Park of making the "remarkable claim that it is unreasonable to infer

that having paid $57.90 for an exclusive membership, he would view the images on the site," Agent Szatkowski's warrant application in fact does not state that Park paid $57.90, nor does it say the membership he purchased was "exclusive." The affidavit states only that federal agents paid $57.90 to obtain a membership to the website. Agent Szatkowski's affidavit had no information regarding how much Mr. Park had paid, what type of membership he purchased, nor for how long or what kind of access to the website his credit card payment allowed.

Though the respondent asserts that the website's name "*darkfeelings.com*" indicates the "nature of its content," Agent Szatkowski evidently did not agree because he did not allege in the affidavit that the name would forewarn a potential visitor that the website would contain child pornography. An agent experienced in the investigation of child pornography cases would allege in a warrant application that the website's name was suggestive of its illegal content if that were true. Again, as discussed in petitioner's original brief, this kind of information was included in the warrant applications at issue in *United States v. Martin*, *supra*, and *United States v. Gourde*, *supra*.

An agent experienced in the investigation of child pornography cases would include evidence of a criminal history or prior conduct in a warrant application to establish the target deserved the profile of a collector of child pornography. Again, as discussed in

petitioner's original brief, this kind of information was included in the warrant applications at issue in *United States v. Wagers*, *supra*, *United States v. Irving*, 452 F.3d 110, 125 (2d Cir. 2006) and *United States v. Riccardi*, 405 F.3d 852, 860-61 (10th Cir. 2005). As recognized by the Wisconsin Court of Appeals in *Park I*, Agent Szatkowski asserted no facts in the affidavit that establish how Mr. Park fit the profile of a collector of child pornography and/or someone who would have visited the *darkfeelings* website with the purpose of viewing child pornography. (Pet. App. 51). Agent Szatkowski's affidavit provides no specific evidence that Mr. Park had ever viewed, downloaded, transmitted or received any images of child pornography from the Regpay website in 2003, nor that Mr. Park ever possessed illegal child pornography at any time before or after 2003.

The failure of Agent Szatkowski's affidavit to allege any of the particularized facts normally included in applications for warrants seeking child pornography again highlights how critical the application of the *Martin, Gourde* and *Froman* inference is to a finding of probable cause here. The failure of the affidavit to allege any of these kinds of potentially incriminating facts requires the respondent to rely heavily in its argument on the fact that Park used his credit card and provided identifying information to purchase a membership to the website. However, the information provided as listed by the respondent is information that is required for any legal purchase using a credit card on the Internet. If it suggests

anything, the fact that Mr. Park provided current identifying information that would allow authorities to locate him instantly would suggest he had no intent to commit a crime by viewing illegal images when he paid to access the website.

The respondent also suggests in its argument that the fact the website was a "members only" and "fee based" website supports a finding that the petitioner would have visited the website with the intent to view illegal images. The affidavit of Agent Szatkowski does not allege that being a "members only" or "fee based" website somehow suggests someone accessing the website could assume it contained illegal images. Anyone versed in law enforcement knows that the Internet is littered with "members only" and "fee based" websites which contain nothing but legal content.

The respondent argues that the twenty-five-month delay between Park's access to the website and the application for the search warrant should not prohibit a finding of probable cause due to the information being stale. The respondent argues that the boilerplate paragraphs of the affidavit relating to the ability of a forensic evaluation to retrieve images from a computer and the proclivities of child pornography collectors establish a likelihood that child pornography would be found at the time of the search. The warrant affidavit also referenced other Operation Falcon search warrants where images were recovered "up to two years" beyond the last known access to a website containing child

pornography. (Pet. App. 85-86). Once again, this argument inappropriately presupposes without foundation that there is evidence to establish that Mr. Park accessed the *darkfeelings* website knowing it contained child pornography and that he was a child pornography collector. As recognized by the Court in *Park I*, Agent Szatkowski's affidavit alleges no facts which establish that Park accessed the *darkfeelings* website with the intent to view illegal images or that he had a history to suggest he fit the profile of a child pornography collector. (Pet. App. 50-51). Furthermore, the lapse of twenty-five months in this case between the known access and search warrant was longer than any other Operation Falcon warrant referred to by Agent Szatkowski in his affidavit.

The validity of the warrant in this case hinges entirely on the application of boilerplate assertions and inferences regarding the conduct of people with an appetite for child pornography who have been established to have accessed a website known to contain child pornography with the purpose of viewing the illegal content of the website. The warrant application here fails to allege particularized facts from which a magistrate could conclude that Mr. Park intentionally visited the website with the purpose of viewing child pornography, that he in fact ever viewed illegal images, or that he was interested in and collected child pornography.

III. THIS COURT SHOULD REMAND THE CASE BACK TO THE WISCONSIN COURT OF APPEALS FOR A DECISION ON APPLICATION OF THE GOOD FAITH EXCEPTION

The respondent argues that if this Court agrees that Agent Szatkowski's affidavit supporting his warrant application established probable cause to believe that Mr. Park viewed child pornography in 2003 but the passage of time negated probable cause to believe child pornography would be found in 2005, this court would then have to determine if the good faith doctrine applied. *See United States v. Leon*, 468 U.S. 897 (1984).

The petitioner asserts that the issue of whether the good faith exception applies to save the warrant in this case would be determined based on the application of Wisconsin law. The standards that govern the requirements for application of the good faith exception that were adopted by the Wisconsin Supreme Court after this court's decision in *Leon* are different than those applied to federal search warrants. *See State v. Eason*, 245 Wis. 2d 206, 217 (2001). The Wisconsin Court of Appeals did not decide in *Park II* whether the good faith exception applied because it had found the warrant was supported by probable cause. (Pet. App. 2). If this court were to decide the warrant here was not supported by probable cause, it should then remand the matter back to the Wisconsin Court of Appeals for a decision on the

issue of the application of the good faith exception under Wisconsin law.

CONCLUSION

The petitioner's writ of certiorari should be granted.

Respectfully submitted,

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